No. 20131

In the

United States Court of Appeals

for the Ninth Circuit

SHATTUCK DENN MINING CORPORATION,
Iron King Branch, a corporation,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Reply Brief of Petitioner

TWITTY, SIEVWRIGHT & MILLS

By RALPH B. SIEVWRIGHT
414 Title & Trust Building
Phoenix, Arizona

Attorneys for Petitioner

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

SUBJECT INDEX

TABLE OF AUTHORITIES

No. 20131

In the

United States Court of Appeals

for the Ninth Circuit

SHATTUCK DENN MINING CORPORATION,
Iron King Branch, a corporation,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Reply Brief of Petitioner

There does not appear to be any dispute concerning the law applicable in this case. Rather, the question centers around the facts and whether or not the Board's findings are supported by substantial evidence on the record considered as a whole. In this case the Board's Decision and Order is based on suspicion alone, rather than substantial evidence, and should be set aside.

ARGUMENT

The Discharge of Nick Olvera

There is absolutely no direct evidence in the record to support the Board's finding that Olvera was discrimin-

atorily discharged. However, the Board argues that the following sequence of events support its conclusion that the Company must have discharged Olvera because of his Union activities:

1. Olvera participated in the Union's organizational drive and had been named a temporary Union officer.
2. The Union processed several grievances shortly after certification and Olvera helped in presenting some of them.
3. A grievance was filed on behalf of Olvera regarding an incident which had occurred between him and his Boss underground.
4. Kentro was alleged to have said that the Union was filing too many small grievances, which didn't amount to much, and he didn't like it.

According to the Board, the above constitutes substantial evidence to support its finding that "the Company discharged Olvera to discourage the Union's continued filing of grievances and its aggressive pursuit of bargaining." (Resp.Br., p. 18)

However, let us look at those events more carefully in the light of the entire record:

1. If Olvera had been active in organizational activities, neither the Company nor his partner was aware of it. (T.157, 270) Olvera, himself, acknowledged this. (T.68) Moreover, the Company had maintained an entirely neutral attitude toward the organizational activities and, even if Olvera had been active in the election, there is no evidence that it was any concern to Management. Other Unions had represented the Company's employees for many years, so this is not a case of an unorganized employer resisting a Union's organizational efforts, such as several of the cases cited by Respondent. (Resp.Br., p. 20, footnote 8)

When Olvera began helping process grievances for the new Union, he was doing nothing more than what he had done for years previously for predecessor unions. (T.11, 65-67) His relations with Management had always been good and there was no evidence to show that his helping handle grievances had any connection whatsoever with his discharge.

2. It should be noted that the International Union of Mine, Mill and Smelter Workers was certified as collective bargaining representative, not Local Union No. 942, as alleged by respondent. (Resp.Br., p. 3) The parties stipulated to this fact. (T. 13, 65) It is not clear from the record when Local 942 entered the picture, or what its status was.

Respondent's Brief gives the impression that the parties were engaged in contract negotiations. "The Board concluded that Olvera was in fact discharged, not for the reasons given, but as a warning to the Union, its officers and adherents of the dangers involved in the vigorous processing of grievances and the aggressive pursuit of bargaining." (Resp.Br., p. 18) This is contrary to the facts. The Company and Union had *not* begun negotiating a contract. (T. 50)

It is true that the new Union filed several grievances; however, there is no evidence to show that the number of grievances filed (five) was unusually large by comparison with the predecessor unions, or by this Union elsewhere in the mining industry.

3. The filing of the grievance on behalf of Olvera the day following the incident of insubordination was done very inconspicuously at the end of another meeting. In retrospect, it appears that this grievance was probably filed on the theory that a good offense is the best defense. Olvera knew he was in trouble with Channon and it would just be a question of time before Management learned of the in-

cident, which occurred the day before. Olvera had apparently been giving Channon a bad time and his defiance of Channon's order to Leadman Portugal appears to have been the straw that broke the camel's back and Olvera knew it. His subsequent, immediate compliance with the Boss' order for him to go to the grizzly indicates Olvera knew he had gone too far.

4. Respondent was careful not to mention the complete absence of any history of anti-union sentiment on the part of the Company of Kentro during his long career in mining. There was no showing of animosity by the Company against this or any other Union, or against Olvera personally. (T. 246, 271) Nevertheless, the Board accepts a vague statement of one unreliable witness that Kentro had "expressed disapproval of the number and kind of grievances the Union had been filing", thus indicating that he had an anti-union motive. (Resp. Br., p. 20), (T. 136)

It is doubful that such a statement was ever made. It isn't as though Portugal's testimony is standing alone unimpeached in the record. The other Union witness in effect denied that the statement was made when they failed to make any mention of such account when asked specifically what Kentro had said at that meeting. (T. 37-47, 177-180) If Kentro had, in fact, made such a statement there is no doubt that all of the Union witnesses would have reiterated it. Yet the Board discredited all other witnesses on this point to find the principal fact upon which to base its case against the Company.

Even assuming such a statement was made, we fail to see how it shows that the Company "had apparently determined to take a firm stand against the Union." (Resp. Br., p. 16) The temporary Local Union President testified that the discussion at this meeting was carried on in a perfectly friendly

manner. (T. 206-207) Two separate grievances were discussed.

Examining the record carefully (T. 136-137), it is very difficult to understand what Portugal actually did say.

"Q. Referring you to General Counsel's Exhibit No. 5, is that the grievance that was also taken up during that session?

A. Is this from—Manuel Gonzales, that is the one I understood. I never did see that before.

Q. This has taking senior men off their regular motorman job and leaving junior motormen. Do you recall if this was discussed?

A. That was discussed, at first, yes.

Q. That was the first thing that was taken up during this meeting?

A. Yes.

Q. O.K. Now, with reference to the grievance that was filed regarding the abusive language of a supervisor, do you remember what the company said concerning this grievance? Who spoke for the company, to your best recollection?

A. For the company?

Q. Yes.

A. Mr. Kentro.

Q. *Do you remember what he said about this particular grievance?*

A. *He said we was turning in too many grievances, small grievances that didn't amount to much, or something like that, and he didn't like it.*

Q. *What did he say about this particular one?*

A. *Well, Manuel, he asked for Sundays—*

Q. (Interposing) *No, I'm sorry. Referring to the grievance with respect to the abusive language of a supervisor,* the one in which your name appears as complainant, and Nick Olvera also was a complainant, *do you remember what the company said about that particular grievance?*

A. *No, not too much.*" (Emphasis added) (T. 136-137)

Thus, from the evidence on which the Board hinges its case, Kentro's comment, if made at all, was said in a perfectly friendly meeting in reference to an unrelated minor work assignment grievance of another employee. By saying it was trivial, which it appears to have been, the Board concludes that Kentro had an anti-union motive because Olvera filed a grievance. There is no connection. It would appear that the Board has strained to find a hostile anti-union motive where it simply did not exist.

The incident of insubordination wasn't an imaginary one. The record shows that there was a serious dispute between Olvera and his boss regarding the time for carrying out a work assignment. All witnesses agree that tempers flared and Olvera acknowledged that Channon felt his order had been countermanded. (T. 74-75) The Union's version of the incident to the Trial Examiner was not the same as given to the Company during the grievance presentation. Olvera had not raised the "lunch time" argument during the initial grievance meeting with the Company. (T. 265-266) Later he undoubtedly wanted to give some plausible excuse for his not wanting to blast. The record shows it was still an hour and fifteen minutes to normal lunch time (T. 70) and the task would have taken only a half hour. (T. 151)

Clearly, however, there was a dispute concerning the Company's right through its supervisors to direct the working force. It had nothing to do with unionism or discrimination, nor was such ever contended. There was ample reason for Management to conclude that the authority of the new Supervisor was being challenged and it should be nipped in the bud. We disagree completely with the Board's judg-

ment that the discipline was senseless or that the Company should have reversed its decision in the face of a strike. (Resp. Br., p. 24) Surely the Company's resistance to pressure to preserve what it believed was right does not constitute evidence of an unlawful motive!

In summary, it appears that the Board has resolved any disputed facts in favor of the Union to show an unlawful motive ignoring the following evidence tending to show that there was no discrimination:

1. The Company and Kentro have a long, unblemished history of good relations with unions. (T. 66-67, 245-249)
2. The Company has remained neutral during Union organizational campaigns and was entirely neutral in this election. (T. 246-249)
3. The Company and the Union representatives had immediately agreed upon a procedure to process grievances even though contract negotiations had not begun. (T. 50, 250-251)
4. Five grievances were routinely handled in a friendly atmosphere and were resolved to the Union's satisfaction as evidenced by the letter of commendation to Kentro. (Resp. Ex. 5)
5. Relations between Kentro and Olvera had always been good. (T. 66-68, 271)
6. Manager Kentro was very disturbed about Olvera's countermanding Channon's order. (T. 199) He sincerely believed that Olvera was trying to undermine the authority of the new supervisor. (T. 258, 261-262)
7. No accusation of an anti-union motive was ever made until after the strike. Logically it would appear that such charges would have been immediately

leveled at the Company by the experienced International representatives when they met with Kentro during the processing of Olvera's grievance if they had sincerely thought Kentro had an anti-union motive. (No representative of the certified International Union testified at the unfair labor practice trial.)

It is understandable that the Board would want to look beyond the sworn statements of Manager Kentro that he had no anti-union motive in discharging Olvera. (T. 270-271) But, it is not logical that the Company's testimony concerning facts and surrounding circumstances be rejected completely. There should at least be substantial evidence in contradiction or to impeach his testimony. An unlawful motive should not be presumed. There is not substantial evidence to base the inferences drawn by the Board from the testimony of the Union witnesses or from the surrounding circumstances.

The Notice

The statement by Respondent (Resp. Br., p. 3) that the Company had orally agreed to meet with the Union to process grievances is more correctly stated that the Company representatives and the certified International Union representatives had *mutually agreed* to process grievances as they had been handled in the past, i.e., the procedure outlined in the Steelworkers contract. (Resp. Ex. 4) (T. 50) It was a two-way agreement by the parties.

Grievances were being processed smoothly and there was no anticipated strike action by the certified Union. Rumors of a strike had come from individual employees, not the Union. (T. 275-276)

The notice was aimed at those certain individuals, who were rumored to have wanted a walkout despite the agreement for handling grievances between the Company and the Union.

The purpose of the Act is not to guarantee individual employees the right to do as they please, but to guarantee them the right of collective bargaining for the purpose of preserving industrial peace. It was precisely for this stability that the bargaining representative and the Company entered into their agreement for an orderly procedure for handling grievances. A meeting was scheduled on the Olvera grievance for May 4; a strike prior to exhausting the grievance procedure would have been unauthorized.

No employees were summarily discharged by virtue of the notice as suggested by Respondent. (Resp. Br., pp. 25-26) When the strike did occur, on May 5 *without notice from the Union*, the Company sent each employee a letter advising him of his right to return to work until a replacement was hired, and published an ad to this effect in the local newspaper. (Resp. Exs. 8 and 9) What more could have been done?

The Company had the right to replace the striking employees, who were attempting to achieve by use of economic pressure what had failed through the agreed grievance procedure, where, as the record shows, the discharge of Olvera was not unlawfully motivated.[1]

Jaime's Discharge

We agree that the "prosecuting witnesses", the Riveras, would have just as soon forgotten about the whole thing regarding Jaime's visit. Their testimony three months after

---

1. *N.L.R.B. v. Mackay Radio & Telegraph Co.*, (U.S.Sup.Ct. 1937) 304 U.S. 333, 58 S.Ct. 904, 82 L.Ed.1381.

the incident was not the same as their account to Kentro the day it occurred.

However, we submit that the intimidation by Jaime, which caused Mrs. Rivera to seek the assistance of the Company Manager, did in fact occur and such misconduct warranted his discharge.

CONCLUSION

In *Universal Camera Corp. v. N.L.R.B.*, the Court declared that the Board's findings must be set aside when the record "clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both."[2]

We do not believe that there was a fair or reasonable evaluation of the testimony by the Board in this case. Its Decision and Order is not supported by substantial evidence on the record as a whole.

Therefore, we respectfully submit that the Board's Decision and Order be set aside in its entirety.

Respectfully submitted,

TWITTY, SIEVWRIGHT & MILLS

By RALPH B. SIEVWRIGHT
414 Title & Trust Building
Phoenix, Arizona

Attorneys for Petitioner

Dated: November 16, 1965.

---

2. *Universal Camera Corp. v. National Labor Relations Board*, (U.S.Sup.Ct.1951) 340 U.S.474, 490, 71 S.Ct.456, 466, 95 L.Ed.456.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

RALPH B. SIEVWRIGHT